185 (D)

Supreme Court, U.S.
FILED

No. 101232 MAR 16 2011

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANALYTICAL DIAGNOSTIC LABS, INC., PETITIONER

v.

BETTY KUSEL, RICHARD F. DAINES, M.D., WENDY E. SAUNDERS, RICHARD W. JENNY, PH.D., STEPHANIE H. SHULMAN, M.S., AND DEIRDRE ASTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK

7 Winthrop Street
Essex, MA 01929-1203
dennisderrick@comcast.net
(978)768-6610

DAVID JAROSLAWICZ
Counsel of Record

Jaroslawicz & Jaros, LLC
225 Broadway
24th Floor
New York, New York 10007
davidjaroslawicz@yahoo.com
(212)227-2780

CURRY & TAYLOR • 202-393-4141

QUESTIONS PRESENTED

1. Must an equal protection "class-of-one" plaintiff establish a virtual identity with its comparators before its claim of unequal treatment or selective enforcement, accomplished with malice, will be recognized?

2. Did the court of appeals abuse summary judgment procedure and deny petitioner due process when it ignored the record which shows a triable fact question whether respondents' harassment and selective regulatory enforcement was undertaken pursuant to a plan to drive petitioner out of business?

RULE 29.6

Petitioner Analytical Diagnostic Labs, Inc. is not affiliated with any publicly traded corporations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 6

REASONS FOR GRANTING THE PETITION 19

CONCLUSION 31

APPENDIX

Circuit Court Decision 1a
District Court Decision 17a
Order Denying Rehearing 31a

TABLE OF AUTHORITIES

Page

CASES

ANDERSON V. LIBERTY LOBBY, 477 U.S. 242, 256-257 (1986) 29, 30
APPEL V. SPIRIDON, 531 F.3D 135 (2D CIR. 2008) 18
BEARD V. BANKS, 548 U.S. 521, 529-530 (2006) 30
ENGQUIST V. OREGON DEP'T OF AGRICULTURE, 553 U.S. 591(2008) 19, 25
BELL V. DUPERRAULT, 367 F.3D 703, 712 (7TH CIR. 2004) 24, 25
BRYAN V. CITY OF MADISON, 213 F.3D 267, 276-277 & N. 17 (5TH CIR. 2000) 22
CELOTEX CORP. V. CATRETT, 477 U.S. 317, 324 (1986) 29
CITY OF NEW ORLEANS V. DUKES, 427 U.S. 297 (1976) 19
CLUBSIDE INC. V. VALENTIN, 468 F.3D 144, 159 (2D CIR. 2006) 23, 27, 30
ENGQUIST V. OREGON DEP'T OF AGRICULTURE, 553 U.S. 591 (2008) 16, 17, 25
ESMAIL V. MACRANE, 53 F.3D 176, 180 (7TH CIR. 1995) 20, 21
HANES V. ZURICK, 578 F.3D 491, 495 (7TH CIR. 2009) 26, 27
HARLEN ASSOCIATES V. VILLAGE OF MINEOLA, 273 F.3D 404, 500 (2D CIR. 2001) 22
HILTON V. CITY OF WHEELING, 209 F.3D 1005, 1008 (7TH CIR. 2000) 22
INDIANA STATE TEACHERS ASSN. V. BOARD OF SCHOOL COM'RS OF THE CITY OF INDIANAPOLIS, 101 F.3D 1179, 1181 (7TH CIR.1996) 28
JOHNSON V. JONES, 515 U.S. 304, 319-320(1995) 31
KIRSCHNER V. ZONING BD. OF APPEALS, 924 F. SUPP. 385, 394 (E.D.N.Y. 1996) 30
LATRIESTE REST. & CABARET INC. V. VILL. OF PORT CHESTER, 40 F.3D 587, 590 (2D CIR. 1994) 22
LECLAIR V. SAUNDERS, 627 F.2D 606, 609-610 (2D CIR. 1980) 22

NEILSON V. D'ANGELIS, 409 F.3D 100, 104 (2D CIR. 2005) 18, 23
NEVEL V. VILLAGE OF SCHAUMBURG, 297 F.3D 673, 681(7TH CIR. 2002) 22
NOR VILLAGE OF WILLOWBROOK V. OLECH, 528 U.S. 562(2000) 19, 25, 26
OLECH V. VILLAGE OF WILLOWBROOK, 130 F.3D 386, 387-388 (7TH CIR. 1998) 19, 20
PRESTOPNIK V. WHELAN, 249 FED. APPX. 210, 213 (2D CIR. 2007) 22
REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 150-151 (2000) 30
SCOTT V. HARRIS, 550 U.S. 372, 378 (2007) 30
UNITED STATES V. ARMSTRONG, 517 U.S. 456, 465-468 (1996) 19
VILLAGE OF WILLOWBROOK V. OLECH,528 U.S. 562 (2000) 21
WILLIAMS V. PRYOR, 240 F.3D 944, 951 (11TH CIR. 2001) 22
YICK WO V. HOPKINS, 118 U.S. 356, 373-374 (1886) 24

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 ..... 3, 12
28 U.S.C. § 1343(a)(3) 3
28 U.S.C. § 2101(c) 2
42 U.S.C. § 1982 3
42 U.S.C. § 1983 ..... 4, 12
N.Y. C.P.L.R. §§ 7801-7806 ..... 7, 8
N.Y. C.P.L.R. § 7804 (2008) 4, 7
N.Y. Pub. Health §§ 572-573 6
N.Y. Pub. Health §§ 574-575 6
N.Y. Pub. Health §§ 577(3) 6

RULES

Fed. R. Civ. P. 56 29
Fed. R. Civ. P. 56(c) 4
Supreme Court Rule 13.3 2

REGULATIONS

10 N.Y. C.R.R. § 51.1 7
10 N.Y. C.R.R. § 19.4(b); (c) (2008) 6

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Second Circuit in *Analytical Diagnostic Labs, Inc. v. Betty Kusel et al.*, Docket No. 08-6297-cv, decided October 4, 2010, reported at 626 F.3d 135 (2d Cir. 2010), reversing the district court's findings but affirming the grant of summary judgment in respondents' favor, is set forth in the Appendix hereto (App.1-16).

The unpublished opinion of the United States District Court for the Eastern District of New York, Cogan, J., in *Analytical Diagnostic Labs, Inc. v. Betty Kusel et al.* , Docket No. 07 Civ. 3908 (BMC)(RER), filed September 15, 2008, granting summary judgment in respondents' favor and dismissing petitioner's complaint with prejudice, is set forth in the Appendix hereto (App. 17-30).

The unpublished Order of the United States Court of Appeals for the Second Circuit in *Analytical Diagnostic Labs, Inc. v. Betty Kusel et al.*, Docket No. 08-6297-cv, filed December 16, 2010, denying petitioner's petition for panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 31).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit reversing the district court's findings but affirming the grant of summary judgment in respondents' favor, was entered on October 4, 2010(App. 1-16). Its further Order denying

petitioner's timely filed petition for panel rehearing or for rehearing *en banc,* was filed and decided on December 16, 2010(App. 31).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc.* 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person...shall be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §§ 1343(a)(3) & (4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit,

> purchase, lease, sell, hold, and convey real and personal property.

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 56(c):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

N.Y. C.P.L.R. § 7804 (2008):

> (a) Special proceeding. A proceeding under this article is a special proceeding.
> ....
> (d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party

there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact....

(f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer....The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

....

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith....

....

STATEMENT

Petitioner Analytical Diagnostic Labs, Inc. ("petitioner" or "ADL") is a privately owned clinical testing laboratory in Brooklyn, New York, operating since 1988. It provides laboratory services, i.e., the testing of blood, urine and other anatomical specimens, for a large number of nursing homes as well as for home care patients in the New York metropolitan area. ADL employs approximately 50-60 persons on a full or part-time basis.

ADL is regulated by the New York State Department of Health ("DOH") which enforces New York State law as it applies to clinical testing laboratories. The regulatory framework provides that such laboratories must have an operating permit (N.Y. Pub. Health §§ 574-575); and in order to qualify for an operating permit, such laboratories must have a Director with a Certificate of Qualification ("CQ") in the areas in which these laboratories intends to perform clinical tests (N.Y. Pub. Health §§ 572-573).

Applicants for the renewal of an operating permit or for a CQ are entitled to a hearing if their "permit or certificate [of qualification is] revoked, suspended, limited or annulled." N.Y. Pub. Health §§ 577(3). However, if an application for the renewal of a CQ is *denied* rather than revoked, DOH regulations require that the applicant be notified of such a denial in writing and the applicant can then request a hearing.10 N.Y. C.R.R. § 19.4(b); (c)(2008). DOH regulations identify in detail how these hearings are to be conducted, including a requirement that they be held before an impartial hearing officer.10 N.Y. C.R.R. §

51.1; 51.9(2008). Thus a party wishing to challenge the DOH's denial of the renewal of an operating permit or a CQ may proceed under Article 78 of the New York Civil Practice Law and Rules (N.Y. C.P.L.R. §§ 7801-7806), a protocol which provides a panoply of due process protections identified in N.Y. C.P.L.R. § 7804.

In order to protect applicants seeking the renewal of a CQ who may be left in administrative limbo when DOH delays its decision, licensing requirements such as these are deemed by the New York State Administrative Procedures Act ("SAPA") to be "adjudicatory" for purposes of the Act (N.Y. A.P.A. § 401(1)), so that applications for the renewal of a CQ must be adjudicated or decided "within a reasonable time." (N.Y. A.P.A. § 301(1)). Moreover, if DOH fails to act upon such an application "within a reasonable time," § 401(2) of SAPA mandates that "the existing license does not expire until the application has been finally determined by the agency...."

Thus the ability of a clinical testing laboratory such as ADL to continue operating under a license or a CQ which has not been finally reviewed at renewal time is an automatic right, *not* a matter of discretionary grace. DOH characterizes these instances of continuing the operating *status quo* of a laboratory where its license has not been finally reviewed at renewal time as the issuance of a "SAPA Letter." DOH posts on its website the names of those clinical testing laboratories which have valid licenses; and a laboratory which has its license in this administrative limbo prevents a clinical testing laboratory such as ADL from planning, particularly long-term planning, with regard to both its customers and its employees.

Mary Anne Kowalski was DOH's director of regulatory affairs from1982-2000 and the author of the regulations under which ADL and other clinical testing laboratories now operate. During Kowalsk's tenure at DOH, it was "very unusual for a laboratory's director's [CQ] not to be renewed...[and she] actually [could] not remember [it] ever happening." Until 2004, neither ADL nor its long-time Director, Dr. Kumar Balakrishnan, had ever had a problem having renewed the laboratory's permit or the Director's CQ. In fact, during Kowalski's 17-year tenure, DOH had *never* issued a SAPA Letter to ADL.

Respondent Betty Kusel ("respondent" or "Kusel") succeeded Kowalski as DOH's director of regulatory affairs and in 2004, assisted by the other named respondents at DOH, she began a campaign to prevent petitioner from operating its clinical testing laboratory and effectively to drive it out of business. Since 2004, DOH has consistently refused to renew ADL's operating permit or the CQ for any of its Directors. However, DOH has also *refused to deny* the applications of ADL and its Directors' for renewal licensing, thereby avoiding the requirement of a due process hearing under Article 78 of the New York Civil Practice Law and Rules, N.Y. C.P.L.R. §§ 7801-7806. Instead, DOH *delayed* making any decision on ADL's license renewal applications, relegating ADL to an administrative limbo and forcing it and its Directors to operate their clinical testing laboratory under SAPA Letters, an impermanent, transitory arrangement which discouraged both present and potential customers of ADL from entering into contracts with it.

The relevant events began in August of 2004 when Dr. Balakrishnan, a board-certified pathologist and ADL's Director since 1988, applied to DOH for a renewal of his CQ. DOH placed a "secret hold" on his application and eventually issued him a SAPA Letter which did not explain why it was refusing to renew his CQ . In June of 2006, Dr. Balakrishnan was still without a CQ from DOH, and he became convinced that the only way to save his career was to resign as Director of ADL. Still without a CQ, Dr. Balakrishnan applied to be Director at Brooklyn Hospital. DOH's head of certification for laboratories, respondent Stephanie H. Shulman ("Shulman"), wrote Brooklyn Hospital criticizing his performance at ADL, falsely accusing him of conducting improper forensic toxicology tests at ADL.

Having lost Dr. Balakrishnan, its long-time Director after 18 years, ADL in June of 2006, hired as its new Director Dr. Matthew Pincus, an extraordinarily well qualified physician and the author of numerous publications on laboratory practice. Dr. George Abraham was also hired as assistant Director. Soon after, on August 2, 2006, in the late afternoon on the eve of a Jewish holiday (Tisha B'Av), DOH conducted a surprise inspection of ADL's offices. Its investigators requested some 20,000 documents, knowing that ADL's officers could not be present because they had to leave in order to observe the religious holiday. The investigators further asked non-Caucasian employees of ADL about their *immigration* status even though ADL had already—as required by regulation---- provided a list of its employees to DOH as all of its employees were required to have licenses from the New York State Education Department, licenses

given only to applicants who are eligible to work legally.

On August 3, 2006, the Jewish holiday of Tisha B'Av, DOH contacted Dr. Pincus while he was observing this holiday, and advised him that ADL was under "serious investigation" for reasons which DOH would not disclose. One week later, on August 10, 2006, respondent Richard W. Jenny, M.D. ("Jenny"), the Director of DOH's Clinical Laboratory Evaluation Program, together with respondent Deirdre Astin ("Astin"), his deputy director, as well as respondent Kusel had conference call with Dr. Pincus and told him that if he continued to work as Director of ADL, "he would be responsible for things that had occurred before he became director and he was placing his [CQ] at risk, although they would not tell him why." (R.A. 16). On August 16, 2006, Dr. Pincus advised ADL that due to pressure from DOH he would have to resign.

Two days later, after having pressured Dr. Pincus to resign as ADL's Director, DOH notified ADL that it would have five (5) days to hire a new Director. On August 21, 2006, ADL hired a new assistant Director, Dr. Ming Liu. DOH's Astin then immediately communicated with Dr. Liu and questioned whether he was going to commit sufficient time to ADL and that he must limit his participation in other laboratories if he intended to work for ADL.

On September 11, 2006, DOH informed ADL that since Dr. Liu was not "fully committed" to his ADL assistant Directorship, DOH was voiding ADL's operating permits to the extent that ADL could only test in the area where Dr. Liu possessed a CQ. On

September 12, 2006, Dr. Liu resigned his position at ADL because of DOH's pressure.

After ADL hired two temporary directors, both of whom left after short periods, it found a permanent replacement for Dr. Liu in January of 2007 when it hired Dr. Joel Lincoln, a medical pathologist. For personal reasons, i.e., he had taken a full-time position at Lutheran Medical Center and planned to open his own laboratory on Staten Island, Dr. Lincoln planned to resign on September 28, 2007; and he believed that when he did leave ADL, he had found an appropriate substitute in Dr. A. Baqui, a highly qualified physician.

On September 12, 2007, DOH, once again on the eve of another Jewish holiday—the High Holiday of Rosh Hoshanah—DOH's Kusel's called Dr. Lincoln and advised that his employment at ADL was placing his entire career in jeopardy. Dr. Lincoln interpreted this call by Kusel as DOH insisting that unless he resign immediately, he would not receive his CQ and his ability to practice pathology in New York would be jeopardized. Dr. Lincoln resigned as Director of ADL the next day. Because Kusel had called Dr. Lincoln on the eve of Rosh Hashanah, Dr. Lincoln did not speak to ADL's owners until the holiday was over on September 15, 2007, after he had already resigned.

On September 17, 2007, respondent Shulman on behalf of DOH contacted Dr. Baqui and told him that if he took the position of Director of ADL, his medical career would be in jeopardy. In addition, two other assistant Directors of ADL (Drs. Abraham and Gang), have been repeatedly refused their CQs by DOH without any explanation.

Alleging these facts, ADL brought this civil rights action under 42 U.S.C. § 1983 *et seq.*, against respondents in federal district court for the Eastern District of New York. Positing federal jurisdiction on 28 U.S.C. §§ 1331;1343(a)(3) & (4), petitioner claimed *inter alia* that respondents under color of State law exercised their regulatory power in a malicious attempt to drive it out of business; that no other clinical testing laboratory has been subject to this unfair, malicious treatment; and that ADL's constitutional right to operate its business free of such malicious interference has been impinged for no rational basis. It asserted a violation of its property rights, its right to due process and to the equal protection of the laws, i.e., its right "not to be treated in a selective manner with malice and bad faith, intended to injure its business." (App. 22). It sought damages under both federal and State law as well as injunctive relief permitting ADL to operate free of DOH's malicious interference. (App. 22).

Discovery among the parties adduced more facts besides DOH's use of Jewish holidays to isolate ADL's owners from its surprise inspections and its intimidation of ADL's Directors. In late 2003, ADL began receiving complaints from DOH that it was performing illegal forensic toxicology. (App. 18). Although ADL performed clinical *non-forensic* toxicology testing for one of its nursing home clients, its laboratory reports expressly disclaimed any forensic testing, explicitly providing that specimen analysis was performed without chain-of-custody handling and that the results should not be used for legal or employment evaluation purposes. (App. 18). ADL's disclaimer was *identical* to that used by other laboratories disavowing forensic toxicology testing, specifically Quest

Diagnostics and LabCorp. (App. 18). Yet DOH nonetheless brought charges against ADL in 2005 for improper forensic toxicology testing and then settled these charges after eventually acknowledging that other laboratories used the same disclaiming language; ADL admitted to no wrongdoing and paid a fine of $3,000. (App. 18-19).

As for ADL's claim that DOH repeatedly harassed its Directors with a malicious intent to force them to resign and drive ADL out of business, discovery produced evidence that even after DOH had settled its claim with ADL in 2005 that it had performed illegal forensic toxicology, DOH's Jenny used this issue in 2006 to threaten Dr. Balakrishnan with potential charges if he did not resign. (R.A. 959-960). DOH's Shulman sarcastically remarked in a e-mail of April 28, 2006, that it was a "smart decision" for Dr. Balakrishnan to resign. (R.A. 744).

Moreover, respondent Kusel wrote Jenny in an e-mail of August 22, 2006:

> [W]e should talk to Balakrishnan, b/c at this point he is facing additional charges; he can do one of two things; admit to not fulfilling duties as a director because hi is incompetent or unwilling to comply–at which case we will take away his CQ—or—he can fall on our mercies that the owners of ADL did not allow him to fulfill his duties—at which point we may be able to show him some leniency.

(R.A. 961). In other words, respondent Kusel was keeping Dr. Balakrishnan's CQ in limbo even after he

resigned as the Director of ADL in order to have leverage with him in case DOH wanted him to testify against ADL in the future. Kusel further wrote in an e-mail in December of 2006 that she would be "willing to allow" a CQ to be granted to Dr. Balakrishnan because it would be "more of a nice surp[r]ise when he's included in the ADL charges." (R.A. 839).

Discovery also revealed evidence that on three separate occasions Kusel and other DOH officials either engaged in or contemplated evidence-tampering in connection with its investigation of ADL; that Kusel timed its inspection of ADL's offices on a Jewish holiday because she thought it would be an opportune time to look for documents since ADL personnel would be away; that DOH videotaped ADL employees during its surprise inspection in order to identify "fleeing personnel" who might have immigration problems, since there was a "prevalence of Pakistani imports;" that DOH complained that ADL's Director and physician, Dr. Liu, lacked a "command of basic English;" that it coerced from Dr. Pincus an affidavit critical of ADL by threatening him with investigation; that it refused to issue a CQ to Dr. Gang solely because he worked at ADL; and that Kusel suggested the federal authorities should investigate a medical supply business owned by the wife of one of ADL's owners for "kickback" potential, a charge entirely without merit. (R.A. 673-674; 675; 698; 700-701; 703; 723; 739; 783; 794; 844;847;866;897;938).

Thus the evidence showed that DOH's Kusel — aided and abetted by other DOH personnel-- personally injected herself into every aspect of ADL, its Directors' licenses and its management in a

malicious effort to undermine its operation and eventually to drive it out of business, a goal which she expressly asserted to co-workers. (R.A. 894). Drs. Balakrishnan, Abraham and Gang *still* have not received approval for the renewal of their CQs, instead having been issued only SAPA Letters.

Following discovery, respondents moved for summary judgment on petitioner's federal "class-of-one" equal protection claim on the grounds that ADL failed to overcome the presumption of rationality which applies to governmental actions. (App. 17-30). They asserted that all their actions against ADL were undertaken either to insure compliance with State laboratory regulations or expressly mandated by statute or regulations and, as for malice, that no other testing laboratory was ever treated differently than ADL. (App. 23).

The district judge, Cogan, J., determined from his review of the summary judgment record that ADL had demonstrated genuine issues of material fact for trial on two of the three elements necessary to establish its equal protection class-of-one claim. (App. 24-26). First, ADL's evidence raised a triable fact issue whether it was treated differently from other similarly situated clinical testing laboratories. (App. 24-25). "An issue of fact exists why DOH's investigation into ADL's non-forensic testing led to charges, a civil penalty, the delayed issuance of a CQ to one lab director, and a string of inspections, while identical laboratories performing the same tests were unaffected." (App. 25).

Second, its proof on summary judgment has "raised a serious fact issue" whether DOH has a

rational basis for its different treatment of ADL. (App. 25-26). The evidence raised a jury question whether DOH's rationale "was to ensure compliance with state regulatory objectives, or whether [respondents] possessed a malicious desire to target [ADL]." (App. 25). As the motion judge reasoned,

> Kusel's scheduling of inspections to coincide with Jewish Holidays, coupled with her question about Dr. Liu's "command of basic English" and Dr. Jenny's statements regarding the presence of "Pakistani imports" at ADL raise questions about [respondents'] reasons for its treatment of ADL beginning in 2003. Furthermore, Kusel's statements that she wanted Dr. Balakrishnan to "fall on [DOH's] mercies" by threatening charges against him unless he spoke negatively about ADL, and that she wanted to give him a "nice surprise" of including him in the charges against ADL, after issuing him an almost-expired CQ, *demonstrate a level of malice inconsistent with merely trying to ensure compliance with state regulations.*

(App. 25)(emphasis supplied). Judge Gogan also adverted to other evidence showing that Kusel and DOH were acting pursuant to a plan "to drive [ADL] out of business." (App. 26).

However, the district judge concluded that ADL's evidence had failed to meet the third element of its equal protection class-of-one claim, as required by the Court's recent decision in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591 (2008), .i.e., that the differential treatment it received from DOH result

from *non-discretionary* state action. (App. 26-28). Because DOH is entrusted by statute with making licensing decisions after subjectively reviewing each individual laboratory's qualifications, the qualifications of its directors and potential directors as well as any complaints and investigation results regarding the laboratory, the district concluded that "the law vests DOH with considerable discretion in licensing medical sites like [ADL's]...[and] [t]his is a matter requiring the exercise of discretion, not the performance of a duty required by law." (App. 26-27). Thus under *Engquist*, ADL could not raise a federal constitutional challenge to a necessarily subjective and individualized decision made by state officials. (App. 28). The lower court dismissed ADL's complaint refusing to exercise supplemental jurisdiction over ADL's malicious interference claim under State law. (App. 28-29).

On appeal, the court of appeals reversed the district court's determination that *Engquist* requires that the challenged different treatment result only from non-discretionary government action before an equal protection class-of-one claim will be recognized. (App. 1-16). Reviewing a conflict in the sister Circuits on the issue, it refused to extend *Engquist's* holding involving a government's discretionary employment decisions to a case such as this one where the state actors were exercising the state's regulatory power since there is a "crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operations." (App. 13-14, quoting *Engquist*, 553 U.S. at 598).

The court of appeals accordingly held that *Engquist* does not bar all class-of-one claims involving discretionary state action and "[w]hile there may be some circumstances where *Engquist* is properly applied outside of the employment context, the case before us is not one of them." (App. 13-14). "Especially where the state is exercising its regulatory and licensing power, we are loath to read *Engquist* as broadly as [respondents] urge." (App. 15).

Even though *Engquist* did not bar ADL's claims, the court of appeals determined that ADL had failed to adduce any evidence showing that respondents had engaged in "intentional disparate treatment," i.e, that respondents were aware that there were other similarly situated individuals who were treated differently, the first element of a class-of-one equal protection claim under its decision in *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005), *abrogated on other grounds*, *Appel v. Spiridon*, 531 F.3d 135 (2d Cir. 2008). (App. 15).

As it viewed the record, there was nothing to show that either Quest Diagnostics or LabCorp, the two other laboratories which DOH was investigating for forensic testing practices, was an appropriate comparator in relevant respects so that DOH's conduct towards them could be compared to its conduct toward ADL. (App. 15-16). Nor did the record show the ethnicity or religion of the owners of these two other laboratories was different from that of ADL's owners. (App. 16). Absent this proof that the other laboratories were similarly situated or that respondents were aware of the similarity and then treated ADL differently,

summary judgment for respondents was appropriate. (App. 16).

On December 16, 2010, the court of appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc*. (App. 31).

REASONS FOR GRANTING THE PETITION

1. A Requirement That An Equal Protection "Class-Of-One" Plaintiff Establish A Virtual Identity With Its Comparators Before Its Claim Of Unequal Treatment Or Selective Enforcement, Accomplished With Malice, Will Be Recognized Is Supported By Neither *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591(2008) Nor *Village of Willowbrook v. Olech*, 528 U.S. 562(2000).

In most contexts, the primary role of the Equal Protection Clause is to act as a limit on government classifications and to protect plaintiffs from discrimination against a vulnerable group to which they belong such as a racial, ethnic or religious minority. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465-468 (1996). However, there can be a denial of equal protection even when the victim does not belong to a class larger than himself; and the clause also protects such class-of-one plaintiffs victimized by the "wholly arbitrary act" of government. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297; 298; 303-304 (1976) (*per curiam*).

In *Olech v. Village of Willowbrook*, 130 F.3d 386, 387-388 (7th Cir. 1998), the class-of-one plaintiff homeowner claimed a violation of equal protection

when the municipality insisted on a 33-foot easement to connect her home to its water supply when the customary easement for other homeowners was just 15 feet. *Id.* at 387. The difference in treatment was alleged to be the result of "substantial ill will" caused by the plaintiff's earlier lawsuit against the municipality for its negligent installation of a nearby culvert. *Id.* The court of appeals reversed the dismissal of the plaintiff's complaint because the allegations showed more than mere "uneven enforcement" by the village but rather a refusal to perform an obligation for one of its residents "for no other reason than a baseless hatred," thereby denying plaintiff the equal protection of the laws. *Id.* at 388.

In reaching this result, the court of appeals relied upon *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995), where it was held that the owner of a liquor store stated a cognizable equal protection class-of-one claim where it was alleged that the mayor in denying the renewal of his liquor license "conducted an orchestrated campaign of official harassment directed at him out of sheer malice." *Id.* at 179. The court concluded that otherwise nonactionable unequal treatment nevertheless makes out an actionable class-of-one equal protection claim when the offending conduct is motivated by ill will and malice, i.e., in a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective: "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Id.* at 179.

Against this backdrop the Court granted certiorari in *Village of Willowbrook v. Olech*,528 U.S. 562 (2000) and, in a *per curiam* opinion, affirmed the court of appeals. *Id.* at 565. Relying upon two of its earlier tax assessment cases addressing unequal treatment, the Court recognized a successful class-of-one equal protection claim "where the plaintiff alleges that she has been treated differently from others *similarly situated* and that there is no rational basis for the difference in treatment." *Id.* at 564 (emphasis supplied). In addition, it held that for a class-of-one claim, it is enough to allege "irrational and wholly arbitrary" conduct by the government. *Id.* at 565. "These allegations, quite apart from the Village's subjective motivation, are sufficient facts to state a claim for relief under traditional equal protection analysis." *Id.* It therefore affirmed the court of appeals "but [we] do not reach the alternative theory of 'subjective ill will' relied on by that court." *Id.*

In a concurring opinion, Breyer, J., sought to clarify the decision so that ordinary violations of state and local law were not transformed into constitutional injuries. *Id.* at 565-566. He noted that in this case, the plaintiff had alleged the extra factor that the government had exhibited "vindictive action," illegitimate animus" and "ill will;" and that the court of appeals had relied upon *Esmail v. Macrane*, *supra*, where there was an illegitimate desire by the town official to "get" the plaintiff. *Id.* at 566. As Justice Breyer, concluded, "...the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.*

In the wake of *Olech*, the various courts of appeals have interpreted the somewhat cryptic language of this decision differently. The Seventh Circuit, with Justice Breyer's concurrence in mind, require that class-of-one plaintiffs present evidence that the defendant "deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000). It has also held that the defendant's personal animus toward the plaintiff is *an alternative* to the Supreme Court standard in *Olech*. *Nevel v. Village of Schaumburg*, 297 F.3d 673, 681(7th Cir. 2002). The Fifth and Eleventh Circuits similarly require that "reasons of a personal nature" be proven. See *Bryan v. City of Madison*, 213 F.3d 267, 276-277 & n. 17 (5th Cir. 2000); *Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir. 2001).

The Second Circuit has apparently left open the question whether an equal protection class-of one plaintiff must prove malice or bad faith by the defendant, retreating from its earlier holdings to this effect in *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) and *LeClair v. Saunders*, 627 F.2d 606, 609-610 (2d Cir. 1980). See *Prestopnik v. Whelan*, 249 Fed. Appx. 210, 213 (2d Cir. 2007); *Harlen Associates v. Village of Mineola*, 273 F.3d 404, 500 (2d Cir. 2001). Instead of requiring a positive showing of defendant's malice or ill will, the Second Circuit has embossed new requirements on class-of-one claims, i.e., plaintiffs must now show not just that they are "similarly situated" to others for purposes of alleging unequal treatment within *Olech* but that they are *virtually identical* to another person's

circumstances. See *Clubside Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006); *Neilson v. D'Angelis*, 409 F.3d 100, 105-106 (2d Cir. 2005).

According to *Neilson* and *Clubside*, this added need for identity----instead of similarity---of circumstances with class-of-one claims is necessary because the existence of persons in similar circumstances who receive more favorable treatment than the plaintiff "is offered to provide an inference that the plaintiff was intentionally *singled out* for reasons that so lack any reasonable nexus with a legitimate government policy that an improper purpose—whether personal or otherwise—is all but certain." *Clubside*, *supra*, quoting *Neilson*, 403 F.3d at 105 (emphasis supplied).

But the need for identity of circumstances under *Neilson* and *Clubside* in order to show the "singling out" of the plaintiff is diluted—indeed, falls away completely—when the class-of-one plaintiff shows through its proof upon summary judgment that the defendant conducted an orchestrated campaign of official harassment directed only at the plaintiff out of sheer malice and ill will, in order to drive him out of business. The proof of "singling out" consists of the defendant's expressed animus toward the plaintiff in serial, predatory acts of unfair, aggressive and punitive regulatory enforcement coupled with the defendant's benign treatment of *similarly situated* persons subject to its same enforcement powers.

Moreover, nothing in *Olech* requires, or even suggests, embossing traditional equal protection analysis with a requirement that a class-of-one plaintiff

prove as part of his case an identity of circumstances instead of a similarity of circumstances. The *Olech* Court *never* imposed this requirement of identical circumstances on the plaintiff there, instead recognizing that a successful class-of-one equal protection claim is one "where the plaintiff alleges that she has been treated differently from others *similarly situated* and that there is no rational basis for the difference in treatment." *Id.* at 564 (emphasis supplied).

If anything, *Olech*, together with Justice Breyer's clarifying concurrence, supports the proposition that by suggesting that proof of bad motive be part of the calculus for proving a class-of-one claim, the decision "brings class-of-one cases into harmony with the standard equal protection cases and the purpose behind the equal protection clause." *Bell v. Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring). After all, the purpose of the Fourteenth Amendment was not just to prevent differential treatment but also to prevent differential treatment stemming from malicious motives. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

Olech's language further suggests that the way for federal courts to avoid transforming ordinary violations of state and local law into constitutional injuries is to require class-of-one plaintiffs to prove that government officials acted with malice or ill will when they "single out" the plaintiff for unequal treatment; it is *not* to impose artificially heightened standards of proof, such as requiring an identity of circumstances with comparators, a requirement having little to do with traditional equal protection analysis or the purposes behind the clause, i.e., to protect a lone,

vulnerable victim who finds itself targeted for extinction by vicious or exploitative discrimination. See *Bell v. Duperrault, supra.*

Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591(2008) does not disturb the thrust of *Olech's* requirements for class-of-one claims but rather reinforces it. In holding that public employers cannot be liable for class-of-one equal protection claims because this theory of liability is poorly suited to government actors who exercise "discretionary authority based upon subjective, individualized determinations" in the workplace, the *Engquist* Court confirmed *Olech's* holding that

> [w]hen those who *appear similarly situated* are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference....Thus, when it appears that an individual has been singled out by the government, the specter of arbitrary classification is fairly raised, and the...Clause requires a "rational basis for the difference in treatment."

553 U.S. at 602, quoting *Olech*, 528 U.S. at 564 (emphasis supplied).

The Court limited its holding barring class-of-one claims to just public employment because judgments in this arena are typically subjective and individualized, resting on an array of factors that are difficult to quantify and because treating like individuals differently in the employment context is "par for the course;"because constitutional restraints on

government are much less onerous when it acts as an employer instead of as a sovereign upon citizens at large; and because an uncabined class-of-one theory risks making a constitutional case out of every decision by a government employer. *Id.* at 599; 604; 607-608.

As the court of appeals below noted, the Circuits are equally split about whether *Engquist* is confined to the pubic employment context or whether it extends to other types of discretionary government behavior and whether class-of-one plaintiffs must now show that the difference in treatment stemmed from non-discretionary action(App. 11-13). However, what undeniably emerges from *Olech* and *Engquist* is a reaffirmation of the equal protection principle that where a class-of-one plaintiff shows that through malice or ill will, he has been "singled out" by government from others *similarly situated* for unequal treatment having no rational basis, an equal protection claim has been made out. *Neither decision requires that a class-of-one plaintiff show an identity of circumstances with its comparators, only that they be similarly situated.*

The court of appeals properly aligned itself with the Seventh Circuit in *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) in holding that *Engquist* does not bar all class-of-one claims involving discretionary state action especially where it is shown that state regulatory actors acted with malice or ill will toward a class-of-one plaintiff (App. 13-14). As the *Hanes* Court wrote, "[t]he [state actor] motivated by malice alone is not exercising discretion and is not weighing the factors relevant to the [actor's] duties to the public." *Id.* at 496.

However, after recognizing that *Engquist* did not bar ADL's class-of-one claim that DOH had maliciously targeted it for increased oversight in order to drive it out of business, the court of appeals resorted to *Neilson's* protocol of proof and applied its heightened burden of requiring an identity of circumstances with ADL's comparators in order for ADL to proceed. (App. 15-16). Even though it couched its test with "similarly situated" language, the court of appeals in reality employed the stringent *Neilson* test which is founded on the requirement of a virtual identity of circumstances among ADL and its comparators. (*Id.*). See *Clubside*, 468 F.3d at 159; *Neilson*, 409 F.3d at105-106.

Adverting to just a fraction of the evidence in this summary judgment record, it found that ADL's evidence failed to meet this heightened standard because it saw nothing to show that either Quest Diagnostics or LabCorp, the two other clinical testing laboratories DOH was investigating for forensic testing practices, was an appropriate comparator in relevant respects so that DOH's conduct towards them could be compared to its conduct toward ADL. (App. 15-16).

This heightened burden of proof imposed by the court of appeals on ADL's evidence is at odds with the requirements of *Olech* and *Engquist* that class-of-one plaintiffs need only show that through malice or ill will, it has been "singled out" by government from others *similarly situated* for unequal treatment having no rational basis to the government's mission. Neither decision supports the proposition that ADL must establish a virtual identity with its comparators before its claim of unequal treatment and selective regulatory

enforcement, carried out with malice, will be recognized.

Moreover, if the "similarly situated" standard was properly applied, ADL's proof on summary judgment was clearly sufficient on this score. "Similarly situated" comparators of ADL are ones who are similarly situated in "all respects rationally related to the government's mission," i.e., DOH's regulation of clinical testing laboratories. See *Indiana State Teachers Assn. v. Board of School Com'rs of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir.1996). The record makes clear that ADL and its comparators are all diagnostic testing laboratories performing the same type of clinical testing; they are all subject to the same licensing requirements; they all sought operating permits from DOH at the relevant times and they all have Directors who require either CQs or SAPA Letters in the event that the issuance of a CQ is delayed; they all have the same regulatory and statutory rights and responsibilities; and they all operate in the same geographical area under like conditions.

ADL and its comparators could be members of the same class for any class-based equal protection analysis and having experienced the same regulation of their respective clinics by DOH during the relevant time period and being subject to the same regulatory framework, they are all "similarly situated" for purposes of ADL's class-of-one claims. In addition, ADL has not pleaded or proved its case as one merely of selective enforcement; it is not complaining merely that equally or more guilty clinical testing laboratories than it are treated more leniently. ADL is complaining

about an official campaign orchestrated against it by respondent Kusel and other DOH personnel out of sheer malice, having nothing to do with regulatory matters, in order to drive it out of business —and its summary judgment proof showed just that.

In the face of this overwhelming, uncontradicted proof of DOH's malicious attempt to destroy ADL's business, imposing upon ADL a stringent, unforgiving standard of a virtual identity with its comparators, a test clearly unauthorized by either *Olech* or *Engquist*, the court of appeals has closed the courthouse doors to those persons whom the Equal Protection Clause was intended to protect.

2. The Court Of Appeals Abused Summary Judgment Procedure And Denied Petitioner Due Process When It Ignored The Record Which Unmistakably Shows A Triable Fact Question Whether Respondents' Harassment And Selective Regulatory Enforcement Was Undertaken Pursuant To A Plan To Drive Petitioner Out Of Business.

Once respondents moved for summary judgment under Fed. R. Civ. P. 56, claiming the absence of a genuine issue of material fact for trial, the burden shifted to petitioner to adduce facts which legitimately put in dispute genuine issues of material fact for trial concerning its class-of-one claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Court has enunciated two core principles in reading the summary judgment record below in order to resolve respondents' motion: both the district judge and the court of appeals

were bound: (1) to draw all reasonable inferences from the materials *against* respondents and *in favor* of ADL; and (2) to resolve all credibility questions *in favor* of ADL because the courts' role is *not* to find facts but only to determine whether there are material fact issues for trial. *Scott v. Harris*, 550 U.S. 372, 378 (2007). *Beard v. Banks*, 548 U.S. 521, 529-530; 534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. at 249-255.

With regard to the court of appeals' analysis of whether ADL's comparators were "similarly situated" for purposes of its equal protection claim, the inquiry is a fact-intensive inquiry presenting a "classic" issue of fact that ordinarily should be submitted to a jury. *Harlen*, 273 F.2d at 499 n.2. *Clubside*, 468 F.3d at 159. It is only when no reasonable jury could find that the persons to whom the plaintiff compares itself are similarly situated that summary judgment should be entered on the question. *Id. Kirschner v. Zoning Bd. of Appeals*, 924 F. Supp. 385, 394 (E.D.N.Y. 1996).

The cryptic summary judgment process employed by the court of appeals failed to meet this standard. It failed give the materials adduced by petitioner, the non-moving party below, the deference they deserved; it failed to read all of these same materials *against* respondents as the moving parties; and it *ignored* most of ADL's overwhelming, uncontradicted proof recited in this petition that it was similarly situated with its comparators and that it had been singled out by respondents for excessive, arbitrary regulatory enforcement going far beyond mere harassment, allowing the justifiable inference that

respondents were maliciously attempting to put ADL out of business.

In this process, the court of appeals improperly drew every inference from the parties' proof *against* ADL. It thereby usurped the role of a trial judge or jury by making findings of fact about the validity----and believability---of ADL's proof, ignoring most of it altogether. ADL deserved a jury trial on all these crucial, disputed fact questions raised by its proof and denying it this opportunity is unfair, a distortion of the Rule 56 summary judgment protocol and a denial of due process.

The court of appeals' unfair, peremptory summary judgment analysis also works a denial of ADL's right to a jury trial on the merits of its claims. "Institutionally speaking, appellate judges enjoy no comparative expertise" over district judges in ferreting out the existence or non-existence of triable issues of material fact—a task which the district judge conscientiously confronted in this case, finding "numerous," "serious" genuine issues of material for trial. (App. 24-26). *Johnson v. Jones*, 515 U.S. 304, 319-320(1995). The court of appeals' egregious mishandling of this record ignored every genuine issue of material fact that it contained and left ADL without a remedy for respondents' malicious, concerted efforts to destroy its business.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit

and, ultimately, to vacate and reverse the grant of summary judgment in respondents' favor and to remand the matter to the United States District Court for the Eastern District of New York for further proceedings including discovery and trial, or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

David Jaroslawicz
Counsel of Record
Jaroslawicz & Jaros, LLC
225 Broadway
24th Floor
New York, New York 10007
(212)227-2780
davidjaroslawicz@yahoo.com

Dennis P. Derrick
7 Winthrop Street
Essex, MA 01929-1203
(978)768-6610
dennisderrick@comcast.net

(any footnotes trail end of each document)

Docket No. 08-6297-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANALYTICAL DIAGNOSTIC LABS, INC., Plaintiff-Appellant,

v.

BETTY KUSEL, RICHARD F. DAINES, M.D., WENDY E. SAUNDERS, RICHARD W. JENNY, Ph.D., STEPHANIE H. SHULMAN, M.S., DEIRDRE ASTIN, Defendants-Appellees.

June 14, 2010, Argued

October 4, 2010, Decided

COUNSEL: DAVID JAROSLAWICZ, Jaroslawicz & Jaros, LLC, New York, NY, for Defendant-Appellant Analytical Diagnostic Labs, Inc.

RICHARD DEARING, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, Andrew M. Cuomo, Attorney General of the State of New York, on the brief), New York, NY for Defendants-Appellees Betty Kusel, Richard F. Daines, M.D., Wendy E. Saunders, Richard W. Jenny, Ph.D., Stephanie H. Shulman, M.S., and Diedre Astin.

CALABRESI, POOLER, and CHIN, Circuit Judges.

OPINION

POOLER, *Circuit Judge*:

This case presents a class-of-one equal protection claim by plaintiff Analytical Diagnostic Labs, Inc. ("ADL"). ADL alleges that defendants - employees of the New York State Department of Health ("DOH") - intentionally and maliciously subjected ADL to an intense and unwarranted degree of regulatory scrutiny. ADL appeals from the September 11, 2008 memorandum decision and order of the United States District Court for the Eastern District of New York (Cogan, *J.*). The district court, relying on the Supreme Court's decision in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008), found ADL's claims barred because ADL could not show the alleged differential treatment resulted from non-discretionary state action. We find the district court's reading of *Engquist* overbroad and reverse that part of the opinion. We also disagree with the district court's conclusion that ADL presented sufficient evidence to demonstrate it was treated differently from other similarly situated entities. We therefore affirm the grant of summary judgment, albeit on different grounds.

BACKGROUND

ADL is a privately owned clinical testing laboratory that serves nursing homes and similar facilities in the New York City area. It is regulated by DOH, and New York state law requires that all clinical laboratories obtain permits annually to continue operating. N.Y. Pub. Health §§ 574-75. Permits are issued only upon a

DOH finding that the laboratory is "competently staffed and properly equipped, and will be operated in the manner" required by law. N.Y. Pub. Health § 575(2). Permits cannot issue until "the laboratory has been inspected and has corrected any deficiencies found." 10 N.Y. Comp. Codes R. & Regs. § 58-1.1(a)(2). In addition, a lab may hold a permit to perform a given category of testing only if the laboratory director holds a certificate of qualification ("CQ") in that category of testing. N.Y. Pub. Health §§ 572, 575(2). CQs are granted for initial terms of two years, and may be renwed for subsequent two-year terms.

ADL began operating approximately 20 years ago, and until 2000, ADL passed its DOH inspections without major deficiencies being noted. In July 2000, the DOH began conducting far more frequent surveys of ADL, as often as every six months, which DOH asserted was necessary because of the number of deficiencies found at the laboratory and ADL's failure to implement a plan of correction.

In late 2003, DOH began investigating allegations that ADL was illegally performing forensic toxicology. ADL did perform some toxicology testing for at least one of its clients, but its laboratory reports clearly stated that specimen analysis was performed without any chain-of-custody handling, and thus test results were not to be used for legal or evaluation purposes. ADL alleges other laboratories, including Quest Diagnostics and LabCorp, used nearly identical disclaimers on similar toxicology testing. DOH brought charges against ADL for improper forensic testing in 2005. Those charges were settled, with ADL admitting no wrongdoing but paying a $ 3,000 civil penalty.

DOH's in-depth scrutiny of ADL continued from 2004 through 2007. Defendant Betty Kusel, director of regulatory affairs at DOH, scheduled numerous surveys and investigations of ADL. Kusel deliberately scheduled at least two of these investigations to fall on Jewish holidays, when she knew ADL's principals, observant Jews, would be out of the office. Kusel told defendant Stephanie Shulman that the absence of ADL's principals would give DOH an opportunity to search for specific paperwork.

On August 2, 2006 -- the eve of a Jewish holiday -- DOH employees arrived at ADL unannounced and stationed an investigator at a side entrance with a video camera, "in hopes of capturing any fleeing personnel." DOH investigators also questioned Pakistani-born ADL employees about their citizenship and immigration status, and whether their families were legally in the United States.

During the same time period, DOH refused to renew ADL's operating permit, instead issuing a series of letters under the State Administrative Procedure Act ("SAPA"). These letters functioned in lieu of an operating permit. ADL's lab directors also began experiencing problems with renewals of their CQs.

In August, 2004, Dr. Kumaranayagam Balakrishnan, ADL's longtime lab director, submitted a renewal application for his CQ. Kusel advised him that his CQ renewal was being delayed because of the ongoing forensic investigation. In March 2006, DOH threatened to charge Dr. Balakrishnan personally for illegal forensic testing, even though ADL already had settled those charges. Dr. Balakrishnan resigned from ADL in

April 2006. Even after his resignation, he faced trouble renewing his CQ. An August 22, 2006 email from Kusel to a DOH staffer stated that Dr. Balakrishnan had two choices: "admit to not fulfilling duties as a director because he is incompetent or unwilling to comply . . . [or] he can fall on our mercies that the owners of ADL did not allow him to fulfill his duties - at which point we may be willing to show some leniency." On December 4, 2006, Kusel emailed another DOH staffer, stating that she would be willing to "settle the old charges and issue a CQ that would be very close to expiring . . . it would be more of a nice surprise when he's included in the ADL charges."

After Dr. Balakrishnan's departure, ADL experienced significant trouble hiring and retaining a lab director. Drs. George Abraham and Matthew Pincus began working there in May and June 2006, respectively. The doctors prepared and submitted a plan of correction to the DOH. After a conversation with defendant Dr. Richard W. Jenny in which Dr. Jenny threatened that any failure to correct the laboratory's problems could negatively impact Dr. Pincus' CQ, Dr. Pincus resigned as laboratory director in August 2006.

ADL then hired Dr. Ming Liu to serve as an assistant laboratory director to Dr. Abraham. Shortly after, defendant Diedre Astin sent Dr. Liu a letter questioning whether he could devote the necessary time to ADL, given that he already held other positions at other facilities. In that same letter, Astin told Dr. Liu that DOH would not approve any director at ADL unless that director could be on the premises of the laboratory for at least 50 percent of its operating hours because of the laboratory's "significant compliance

issues." As Dr. Abraham did not hold a CQ in various testing categories, DOH voided ADL's operating permit and directed ADL to cease testing in those categories. On September 28, 2006, Dr. Liu resigned.

On the same day as Dr. Liu's resignation, a DOH supervisor visited ADL and found the laboratory had corrected all prior deficiencies and found no significant new problems. DOH never conveyed the results of the surveyor's visit to ADL.

ADL then hired Dr. Lilia Mesia as its laboratory director and Dr. Henry Gang as assistant director in October 2006. Because Dr. Mesia possessed the required CQ's, DOH issued a SAPA letter authorizing ADL to resume testing in all areas except one, since Dr. Abraham indicated the laboratory was not ready to resume testing in that area. In January 2007, Dr. Mesia moved out of state, so ADL hired Dr. Joel Lincoln as director. In September 2007, Dr. Lincoln accepted other employment, and wanted to remain at ADL to ease the new director's transition. Kusel called Dr. Lincoln on Rosh Hashanah to discuss his responsibilities and obligations as ADL's director and told Dr. Lincoln his own CQ could be in jeopardy if he remained and ADL failed to meet compliance standards. Dr. Lincoln resigned from ADL on September 13, 2007. On September 14, 2007, DOH again voided ADL's operating permit in the areas in which Dr. Lincoln had been the only CQ holder and directed plaintiff to cease testing in those areas. ADL then hired Dr. A. Baqui to serve as director, and DOH again granted ADL provisional authority to test in the voided areas.

The district court's decision

The district court began its summary judgment analysis by stating the test for an equal protection class-of-one claim, namely that (1) plaintiff was treated differently than a similarly situated entity; and (2) defendants treated plaintiff differently with no rational basis. *Analytical Diagnostic Labs, Inc. v. Kusel, et al*, No. 07 Civ. 3908, 2008 U.S. Dist. LEXIS 76426, 2008 WL 4222042 (E.D.N.Y. Sept. 11, 2008). Relying on the Supreme Court's decision in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008), the district court found plaintiffs must also satisfy a third requirement: that the differential treatment resulted from non-discretionary state action. *Kusel*, 2008 U.S. Dist. LEXIS 76426, 2008 WL 4222042, at *3. Applying these standards, the district court determined that ADL raised genuine issues of material fact on the first two requirements, differential treatment and malice; but not on the third, finding:

> The differential treatment plaintiff allegedly received resulted from defendants' investigation of complaints regarding ADL and the decisions of DOH employees on whether or not to issue CQs and permits to the laboratory and its employees. These are clearly discretionary state activities, as DOH is entrusted with making licensing decisions after subjectively reviewing each individual laboratory's qualifications, the qualifications of its directors and potential directors, and any complaints and investigation results regarding the laboratory. This is a matter requiring the exercise of discretion, not the performance of a duty required by law.

Id. at *4. (citation omitted). The district court concluded:

> Regardless of the other serious factual issues raised by plaintiff as to the different treatment and defendants' motivations, the undisputed fact remains that DOH officials possess discretion to subjectively evaluate laboratories and make licensing decisions, and any differential treatment of ADL stemmed from these discretionary activities. As the *Engquist* Court noted, a plaintiff cannot raise a federal constitutional challenge to a necessarily subjective and individualized decision made by state officials.

Id. at *5 (citations omitted). The district court then declined to exercise supplemental jurisdiction over ADL's state law claims and dismissed the complaint in its entirety. This appeal followed.

DISCUSSION

We review a district court's grant of summary judgment de novo. *Kaytor v. Electric Boat Co.*, 609 F.3d 537, 546 (2d Cir. 2010). To prevail on a summary judgment motion, the moving party must demonstrate that there is no genuine issue of material fact to be tried and that the undisputed facts warrant summary judgment as a matter of law. *Id.* at 545.

A class-of-one claim exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). We have held that to succeed on a class-of-one claim, a plaintiff must establish that:

(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.

Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005), abrogated on other grounds, *Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008).[1]

The Supreme Court's decision in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008) eliminated class-of-one claims for government employees. In essence, *Engquist* is a jurisdiction-limiting decision. *Engquist* involves a former state employee laid off during an agency reorganization. She sued, alleging she was fired for arbitrary and malicious reasons. *Engquist*, 553 U.S. at 595. Engquist sought to bring a class-of-one claim, arguing that the Constitution applies to the state in its role as employer, as well as in its role as regulator.

The *Engquist* court examined *Olech*, in which the plaintiff property owner had asked the village to connect her property to the municipal water supply. The village had required others seeking access to provide only a 15-foot easement, but asked Olech to provide a 33-foot easement. She sued, alleging the requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. The *Olech* court held that she stated a valid class-of-one claim

under the Equal Protection Clause because she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564. The *Engquist* court concluded that *Olech* turned on "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." 528 U.S. at 601. It continued:

> There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations - at least not with regard to easement length, however typical such determinations may be as a general zoning matter. Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

Id. at 602-03 (citation omitted). Conversely, the *Engquist* court found that some types of state action inherently "involve discretionary decisionmaking based on a vast array of subjective, individualized assessment." *Id.* at 603. Such state action does not violate the Equal Protection Clause "when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Id.* The court found "[t]his principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized" and dismissed Engquist's

claim. *Id.* at 604. The opinion noted that the Court's holding was limited to finding "that the class-of-one theory of equal protection has no application in the public employment context - and that is all we decide . . . ." *Id.* at 607.

Our Court has yet to address whether *Engquist's* prohibition is limited to the public employment context, or whether it extends to other types of discretionary government behavior. Several district courts in this Circuit have extended *Engquist's* holding to require that plaintiffs seeking to establish a class-of-one claim must show the difference in treatment flowed from non-discretionary action, but they have done so without persuasive analysis. *See, e.g., Dunlea v. Federal Bureau of Prisons*, No. 3:10-cv-214, 2010 U.S. Dist. LEXIS 41134, 2010 WL 1727838, at *3-4 (D. Conn. April 26, 2010) (dismissing class-of-one claim for prisoner denied use of prison email system); *Tarantino v. City of Hornell*, 615 F. Supp. 2d 102, 116-17 (W.D.N.Y. 2009) (dismissing class-of-one claim challenging discretionary decision to enforce city codes). Conversely, in *Alfaro v. Labrador*, the Eastern District of New York rejected other courts' findings that a class-of-one claim never can be brought in a law enforcement context. No. 06-CV-1470, 2009 U.S. Dist. LEXIS 72532, 2009 WL 2525128, at *8-11 (E.D.N.Y. Aug. 14, 2009). Rather, Judge Seybert read *Engquist* and *Olech* to define "discretionary decisions, for the purpose of barring class-of-one claims, as those that involve discretion that is actually exercised on a day-to-day basis, rather than decisions that are theoretically discretionary but - as a practical matter-actually depend on de facto standards." 2009 U.S. Dist. LEXIS 72532, [WL] at *9. She allowed

Alfaro's claim that he was unconstitutionally singled out for zoning violations to go forward.

Our sister Circuits are equally split. In a nonbinding decision, the Sixth Circuit held that *Engquist* likely was limited to the public employment context and probably did not control in a class-of-one claim in a denial of parole case. *Franks v. Rubitschun*, 312 Fed. Appx. 764, 766 n. 3 (6th Cir. 2009). Conversely, the Eleventh Circuit extended *Engquist* to claims by government contractors, finding that "[j]ust as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'" *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008) (citation omitted). Similarly, the Eighth Circuit found a police officer's investigative decisions could not be challenged with a class-of-one equal protection claim because such decisions are inherently discretionary. *Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009).

The Seventh Circuit issued several decisions expanding *Engquist* beyond public employment. *See Srail v. Village of Lisle*, 588 F.3d 940, 944-45 (7th Cir. 2009) (applying *Engquist* to a municipality's "subjective and individualized assessment" to extend municipal water to some communities but not others); *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) (applying *Engquist* to bar class-of-one claims challenging prosecutorial decisions). However, in *Hanes v. Zurick*. the Seventh Circuit declined to apply *Engquist* to bar a class-of-one claim alleging that the police defendants

repeatedly arrested plaintiff without cause. 578 F.3d 491, 495-96 (2009).

The *Hanes* court looked at the reasons underlying the *Engquist* decision:

> First, the Court emphasized that the judgments unsuited to a class-of-one claim are typically "subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." That describes employment decisions because treating like individuals differently in the employment context is "par for the course." Second, the Court noted that the constitutional constraints on government are much less onerous when it acts as employer as compared to acting as sovereign. Finally, the Court recognized that, in the employment context, an uncabined class-of-one theory risks making a constitutional case out of every decision by a government employer.

Id. at 495 (citations omitted). However, the *Hanes* court concluded, that does not mean every class-of-one claim involving any discretionary state action is barred. *Id.* at 495-96. Indeed, the *Hanes* court held *Engquist* did not bar plaintiff's claim because not all discretionary activity is "off-limits from class-of-one claims." *Id.* at 495.

We join the Seventh Circuit in holding that *Engquist* does not bar all class-of-one claims involving discretionary state action. While there may be some circumstances where *Engquist* is properly applied outside of the employment context, the case before us is

not one of them. Critically, the state defendants here exercised the state's regulatory power. As the *Engquist* court recognized, there is a:

> crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operations.

Engquist, 553 U.S. at 598 (citations, quotations and brackets omitted). The "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.*

Moreover, DOH does not possess unfettered discretion in deciding whether to revoke, suspend or otherwise limit an existing license. N.Y. Pub. Health § 577(3). DOH cannot revoke existing licenses without a hearing. *Daxor Corp. v. State Dept. of Health*, 90 N.Y.2d 89, 98, 681 N.E.2d 356, 659 N.Y.S.2d 189 (1997). The hearing's outcome could further be challenged in an Article 78 proceeding. N.Y. C.P.L.R. § 7801 et seq. DOH must operate within the regulatory framework set forth in the New York's Public Health Law, and the actions of its officials are reviewed under a qualified immunity standard, not an absolute immunity standard. *See, e.g., Blue v. Koren*, 72 F.3d 1075, 1083 (2d Cir. 1995). As aptly noted by the *Hanes* court, "the officer who repeatedly arrests someone solely because of malice does have a way to distinguish between the citizen repeatedly arrested and the citizen left alone: the officer hates the arrestee." *Hanes*, 578 F.3d at 496. Similarly, here plaintiffs have a way to distinguish

themselves and other labs who are allegedly subject to less scrutiny by DOH: defendants maliciously targeted ADL for increased oversight. Especially where the state is exercising its regulatory and licensing power, we are loath to read *Engquist* as broadly as defendants urge.

Having found *Engquist* does not bar ADL's claims, we return to the class-of-one factors set forth in *Neilson*. 409 F.3d at 104. The first factor requires that a plaintiff show that "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy." *Id.* In *Giordano v. City of New York*, we required that class-of-one plaintiffs prove "intentional disparate treatment," that is, demonstrate the decisionmakers were aware that there were other similarly-situated individuals who were treated differently. 274 F.3d 740, 751 (2d Cir. 2004).

We find nothing in the record that raises a question of fact as to the alleged disparate treatment. ADL relies on a December 2005 letter from a DOH attorney (who is not a defendant here) on DOH stationary naming two other labs being investigated for the same forensic testing practices as ADL. The letter, however, proves nothing regard regarding the other two laboratories except that DOH had concluded its investigation of each for apparently similar conduct. The letter provides no proof that the other two laboratories were appropriate comparators, as the letter does not disclose their regulatory histories or whether they were similar to ADL in relevant respects. Nor does the record contain any other evidence that the laboratories were

similar in relevant respects. Moreover, although ADL now argues on appeal that DOH's decisions were motivated by the religion or ethnicity of ADL's owners, it presented no evidence that the owners of the other two labs were of a different religion or ethnicity. As there is no record evidence raising a question of fact as to whether (1) other labs were similarly situated; or (2) even assuming other labs were similarly situated, that the same decisionmakers were aware of the similarity and treated ADL differently, summary judgment in favor of the defendants is appropriate.

CONCLUSION

For the reasons given above, we reverse the district court's findings, but affirm the grant of summary judgment, albeit on different grounds.

Footnote'

1As noted in *Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008), *Engquist* overruled *Neilsen* insofar as *Neilsen* involved a public employee asserting a class-of-one equal protection claim. The remainder of *Neilsen's* holdings, including its articulation of the elements of a class-of-one claim equal protection claim, remain intact.

07 Civ. 3908 (BMC)(RER)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ANALYTICAL DIAGNOSTIC LABS, INC., Plaintiff,

-against-

BETTY KUSEL, RICHARD F. DAINES, M.D., WENDY E. SAUNDERS, RICHARD W. JENNY, Ph.D., STEPHANIE H. SHULMAN, M.S., and DEIRDRE ASTIN, Defendants.

September 11, 2008, Decided
September 15, 2008, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Analytical Diagnostic Labs, Inc, Plaintiff: David Jaroslawicz, LEAD ATTORNEY, Jaroslawicz & Jaros, New York, NY; Robert Joseph Tolchin, Law Office of Robert Tolchin, New York, NY.

For Betty Kusel, M.D. Richard F. Daines, Wendy E. Saunders, Richard W. Jenny, Ph.D., Stephanie H. Shulman, M.S., Deirdre Astin, Defendants: Seth J. Farber, N.Y.S. Office of the Attorney General, New York, NY.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

Defendants have moved for summary judgment on plaintiff's § 1983 equal protection "class of one" claim.[1] For the following reasons, defendants' motion is granted, and the action is dismissed.

BACKGROUND

The Court has taken the undisputed facts set forth herein from the parties' affidavits, exhibits, and Rule 56.1 statements, viewed in the light most favorable to plaintiff as the non-moving party. See *Capobianco v. City of New York*, 422 F.3d 47, 50 (2d Cir. 2005).

Plaintiff operates Analytical Diagnostic Labs ("ADL"), a privately-owned clinical testing laboratory serving nursing homes and similar facilities in the New York metropolitan area. In late 2003, plaintiff began receiving complaints from the New York State Department of Health ("DOH") that ADL was performing illegal forensic toxicology. Although ADL did conduct clinical non forensic toxicology testing for one of its nursing home clients, its laboratory reports explicitly disavowed any forensic testing, stating that specimen analysis was performed without chain of custody handling, and thus that test results should not be used for legal or employment evaluation purposes.

This disclaimer was identical to that used by other laboratories in disavowing forensic toxicology testing, specifically Quest Diagnostics and LabCorp. Although DOH brought charges against plaintiff for improper forensic toxicology testing in early 2005, DOH eventually acknowledged that other laboratories used the same disclaiming language and agreed to a

settlement whereby plaintiff admitted no wrongdoing but paid a $ 3,000 civil penalty.

As part of its inquiry into the forensic toxicology and other complaints against plaintiff, from 2004 through 2007, defendant Kusel -- Director of Regulatory Affairs at the DOH's Wadsworth Center for Laboratories scheduled numerous surveys and investigations of ADL. Kusel set at least two of these investigations to occur on Jewish holidays, when Kusel knew plaintiff's laboratory principals (observant Jews) would be away from the laboratory. Kusel opined to defendant Shulman -- head of the DOH Certification Unit for Laboratories -- that these employees' absences over Rosh Hashanah would provide an opportunity to search for specific paperwork pertaining to Coney Island Hospital.

During the investigation on August 2, 2006, the eve of the Jewish holiday Tisha B'Av, DOH employees arrived unannounced at plaintiff's laboratory and stationed an investigator at the side exit of the laboratory with a video camera. As DOH investigators noted in an email exchange, they planned to videotape the side exit "in the hopes of capturing any fleeing personnel." Also during this August 2006 investigation, DOH investigators questioned Pakistani-born laboratory employees about their citizenship and immigration status, and whether their families were legally in the United States.[2]

New York requires laboratory directors to have a Certificate of Qualification ("CQ") covering the areas of testing in which the director is certified; to maintain an operating permit, a laboratory must have a director

who possesses a CQ in all areas of testing performed by the laboratory. In 2004, ADL also began experiencing issues stemming from DOH's decisions on whether to issue CQs to its laboratory directors, and consequently whether the laboratory would receive testing or operating permits.

First, in August 2004, Dr. Kumaranayagam Balakrishnan, plaintiff's longtime laboratory director, submitted a renewal application for his CQ. Kusel advised him at that time that the processing of his CQ application was delayed because of the ongoing forensic toxicology investigation. In March 2006, Kusel and defendant Dr. Jenny -- director of the DOH Clinical Laboratory Evaluation Program ("CLEP") -- threatened Dr. Balakrishnan with personal administrative charges based on the alleged forensic testing at ADL. Dr. Balakrishnan resigned as laboratory director in April 2006, although DOH continued to threaten charges against him and withhold his CQ.[3]

Next, Drs. George Abraham and Matthew Pincus began working as laboratory directors in May and June 2006, respectively. In an attempt to respond to deficiencies identified in a May 2006 survey of ADL, these doctors prepared and submitted to the DOH a plan of correction. Dr. Jenny, Kusel, and defendant Astin - Deputy Director of CLEP - discussed the laboratory's compliance problems and deficiencies in two off-the-record telephone conversations with Dr. Pincus, and Dr. Jenny threatened that any failure to correct the laboratory's deficiencies could negatively impact Dr. Pincus' own CQ. After these conversations,

on August 14, 2006, Dr. Pincus resigned as laboratory director.

After Dr. Pincus' departure, plaintiff hired Dr. Ming Liu to serve as assistant laboratory director to Dr. Abraham. On August 31, 2006, Astin sent Dr. Liu a letter questioning his ability to devote the necessary time commitments to ADL, since he already served as a full-time pathologist at another medical center, a laboratory director at two other laboratories, and a per-diem pathologist at various other facilities. Astin's letter stated that DOH would condition approval of any director at ADL upon the director's ability to actively direct the laboratory and spend at least 50% of the operating hours of the laboratory on the premises in order to resolve the laboratory's "significant compliance issues." In an email from Kusel to Shulman and Dr. Jenny, she stated that she thought Dr. Liu "lack[ed] a command of basic English," and that she did not "trust [ADL's president] or the situation." On September 11, 2006, Dr. Jenny sent a letter to ADL's president, indicating that while DOH approved of Dr. Abraham as laboratory director, it did not approve of Dr. Liu because of his inability to meet the time requirements of the position. Furthermore, because Dr. Abraham lacked a CQ in various testing categories, DOH voided plaintiff's operating permit and directed plaintiff to cease testing in these categories.

Dr. Liu formally resigned as assistant laboratory director on September 28, 2006. On that same date, a DOH surveyor inspected ADL and found no significant problems. The surveyor reported that plaintiff had corrected all prior deficiencies. DOH did not forward the results of this positive inspection to plaintiff.

To replace Dr. Liu, plaintiff hired Dr. Lilia Mesia as its laboratory director and Dr. Henry Gang as assistant director in October 2006. Based on Dr. Mesia's CQs and the September 28, 2006 inspection, DOH granted provisional approval for plaintiff to resume testing in all previously voided areas except one, since Dr. Abraham had indicated during the survey that the laboratory was not yet ready to resume testing in this area. DOH issued plaintiff a letter under the State Administrative Procedure Act (a "SAPA Letter"), which functioned in lieu of an operating permit pending a final DOH determination on ADL's compliance and its qualifications in the approved areas of testing.

Plaintiff's problems in retaining a laboratory director satisfactory to DOH continued into 2007. In January, after Dr. Mesia moved out of state, plaintiff hired Dr. Joel Lincoln as director. In September, after DOH learned that Dr. Lincoln had decided to accept a position at another hospital's laboratory and work as a principal of a start-up laboratory, Kusel called Dr. Lincoln (again on Rosh Hashanah) to discuss his responsibilities and obligations as ADL's laboratory director. Dr. Lincoln implied that he wished to remain at ADL to ease the transition to a new director, but Kusel told Dr. Lincoln that his own CQ could then be in jeopardy if he remained and ADL failed to meet compliance standards. After two conversations with Kusel, Dr. Lincoln resigned as laboratory director on September 13, 2007. On September 14, 2007, DOH again voided plaintiff's operating permit in the areas in which Dr. Lincoln had been the only CQ holder, and directed plaintiff to cease testing in those areas. After plaintiff hired Dr. A. Baqui to serve as laboratory director in late September 2007, DOH granted plaintiff provisional

approval to begin re-testing in the previously voided areas on October 3, 2007.

Rather than issue plaintiff an operating permit to reflect its approval to test in the designated areas, DOH has provided plaintiff with only SAPA Letters since the voiding of its permit. As a result, the DOH website does not show plaintiff as having a current operating permit. Furthermore, numerous of plaintiff's former laboratory directors - including Drs. Balakrishnan, Abraham, and Gang - still have not received approval for the renewal of their CQs, and have instead only been issued SAPA letters.

DISCUSSION

Plaintiff has claimed that defendants' conduct since 2003 has violated its constitutional equal protection rights on a "class of one" theory, because defendants have intentionally and maliciously treated it differently from other laboratories with no rational basis. Plaintiff has also claimed that defendants have violated New York law by maliciously interfering with its business.

Defendants argue that plaintiff has failed to overcome the presumption of rationality applicable to governmental actions in a class of one claim. Defendants have asserted that all of their actions were either undertaken for rational reasons (namely to ensure compliance with state laboratory regulations) or expressly mandated by statute or regulation. Defendants have further argued that regardless of plaintiff's allegations concerning defendants' malice, plaintiff has failed to identify any similarly situated laboratories that defendants ever treated differently.

I. Federal Equal Protection Claim

Traditionally, a plaintiff bringing an equal protection class of one claim had to demonstrate (1) that it was treated differently from an entity similarly situated in all relevant respects; and (2) that defendants treated it differently with no rational basis. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). The Supreme Court recently set forth a third requirement: to prevail on an equal protection class of one claim, a plaintiff must also demonstrate that the differential treatment it received resulted from non-discretionary state action. *Engquist v. Orevzon Dep't of Agriculture*, U. S. , 128 S.Ct. 2146, 2154, 170 L. Ed. 2d 975 (June 9, 2008). See *Sloup v. Loeffler*, No. 05-CV-1766, 2008 U.S. Dist. LEXIS 65545, 2008 WL 3978208, * 15-16 (E.D.N.Y. Aug. 21, 2008) (noting that Engquist added an additional requirement and applying Engquist outside of the public employment context); *Siao-Pao v. Connolly*, 564 F. Supp. 2d 232, 2008 WL 2540815, *10 (S.D.N.Y. 2008) (applying Engquist outside of the public employment context and stating Engquist "clarified the Olech holding by limiting class of one claims in contexts characterized by individualized and subjective determinations where 'allowing a challenge based on the arbitrary singling out of a particular [entity] would undermine the very discretion that such state officials are entrusted to exercise.'").

Plaintiff has established genuine issues of material fact on the first two requirements for a class of one equal protection claim. First, regarding differential treatment from similarly situated entities, plaintiff presented

evidence that its non-forensic testing disclaimer was the same as that used by Quest Diagnostics and LabCorp. – other laboratories performing the same type of testing as ADL, and thus arguably identical in all relevant respects. See *Clubside, Inc.*, 468 F.3d at 159 ("Generally, whether parties are similarly situated is a fact-intensive inquiry."); *Sloup*, 2008 U.S. Dist. LEXIS 65545, 2008 WL 3978208 at * 16 (noting a genuine issue of fact exists where a rational jury could find the entities prima facie identical). An issue of fact exists why DOH's investigation into ADL's non-forensic testing led to charges, a civil penalty, the delayed issuance of a CQ to one lab director, and a string of inspections, while identical laboratories performing the same tests were unaffected.

Second, regarding defendants' basis for the differential treatment, plaintiff has raised a serious factual issue as to whether defendants' rationale was to ensure compliance with state regulatory objectives, or whether defendants instead possessed a malicious desire to target plaintiff. Kusel's scheduling of inspections to coincide with Jewish Holidays, coupled with her question about Dr. Liu's "command of basic English" and Dr. Jenny's statements regarding the presence of "Pakistani imports" at ADL, raise questions about defendants' reasons for its treatment of ADL beginning in 2003. Furthermore, Kusel's statements that she wanted Dr. Balakrishnan to "fall on [DOH's] mercies" by threatening charges against him unless he spoke negatively about ADL, and that she wanted to give him the "nice surprise" of including him in charges against ADL after issuing him an almost-expired CQ, demonstrate a level of malice inconsistent with merely trying to ensure compliance with state regulations.

Plaintiff has also presented numerous other factual questions relevant to defendants' bases for their actions, including whether Kusel threatened an investigation against ADL's president's wife, whether she brought baseless charges against ADL before analyzing whether the regulations supported the claims, and whether she and the other defendants intimidated any of ADL's directors into leaving their positions as part of a plan to drive plaintiff out of business.

Despite the numerous issues of material fact that exist on these first two requirements, plaintiff's failure to meet the third requirement is fatal to its class of one claim. The differential treatment plaintiff allegedly received resulted from defendants' investigation of complaints regarding ADL and the decisions of DOH employees on whether or not to issue CQs and permits to the laboratory and its employees. These are clearly discretionary state activities, as DOH is entrusted with making licensing decisions after subjectively reviewing each individual laboratory's qualifications, the qualifications of its directors and potential directors, and any complaints and investigation results regarding the laboratory. See N.Y. PUB. HEALTH L. §§ 570-76 (McKinney's 2001) (discussing the public health and safety concerns implicated in state licensing decisions for clinical laboratories and establishing the criteria considered by DOH officials when deciding whether to issue CQs and permits); 10 N.Y.C.R.R. 19.1 et seq, 58-1.1 et seq. (instructing DOH on factors to evaluate when issuing CQs and operating permits, including the qualifications of potential laboratory directors, the laboratory's inspection results, and correction of any deficiencies); *Daxor Corp. v. State of NY Dep't of*

Health, 90 N.Y.2d 89, 98, 681 N.E.2d 356, 361-62, 659 N.Y.S. 2d 189, 194 (1997) ("[1]t is clear that the law vests [DOH] with considerable discretion in licensing medical sites like [plaintiff's]"). This is a matter requiring the exercise of discretion, not the performance of a duty required by law.

The evidence in the record demonstrates defendants' exercise of their discretion in evaluating ADL and its directors as part of their licensing decisions. During the time period in question, DOH had received complaints about ADL's alleged forensic testing, and inspections of the laboratory had revealed deficiencies in plaintiff's testing practices. DOH employees had discretion to take measures to investigate and address these issues. See N.Y. PUB. HEALTH L. § 576 (McKinney's 2001). For example, Astin's August 31, 2006 letter to Dr. Liu noted ADL's prior "significant compliance problems" and the "active investigation into its test practices, primarily in the area of Hematology." Astin indicated that because of these concerns, DOH would require any potential director of ADL to make a greater time commitment to overseeing the laboratory. She further indicated, based on her consideration of the factors listed in 10 N.Y.C.R.R. 58, that Dr. Liu's proposed position at ADL would mark his third directorship at a clinical laboratory and thus questioned his ability to meet these heightened requirements. Likewise, defendants' conversations with Drs. Pincus and Lincoln focused specifically on ADL's compliance issues and deficiencies; defendants reminded the doctors of their high responsibilities as laboratory directors to ensure ADL's remediation of these issues and the laboratory's compliance with rules and regulations.

Furthermore, defendants directed ADL to cease testing in certain areas only after the departure of a laboratory director who possessed the sole CQ in those areas, and granted provisional approval to ADL to reassume testing once a director with a suitable replacement CQ had been hired by ADL and approved by DOH. This is in accordance with the regulatory requirements governing DOH action, which grants DOH the discretion to evaluate laboratory directors and only issue a permit to a laboratory to test in the areas in which it finds the laboratory directors qualified. See 10 N.Y.C.R.R. 19.3, 58-1.1.

Regardless of the other serious factual issues raised by plaintiff as to different treatment and defendants' motivations, the undisputed fact remains that DOH officials possess discretion to subjectively evaluate laboratories and make licensing decisions, and any differential treatment of ADL stemmed from these discretionary activities. As the Engquist Court noted, a plaintiff cannot raise a federal constitutional challenge to a necessarily subjective and individualized decision made by state officials. See 128 S.Ct. at 2154. Plaintiff has failed to allege a federal equal protection violation based on defendants' exercise of discretion as DOH employees.

II. State Malicious Interference Claim

Having dismissed plaintiff's federal equal protection claim, the Court declines to exercise supplemental jurisdiction over plaintiff's state law malicious interference claim in the interests of comity, convenience, judicial economy, and fairness. See *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d

Cir. 2006) (discussing a district court's discretion in declining to exercise supplemental jurisdiction over state law issues where all federal claims have been dismissed prior to trial); *Volmar v. North Shore Hosp.*, 216 Fed. Appx. 136, 137 (2d Cir. 2007) (stating district courts should avoid state law decisions after dismissal of all federal claims as a matter of comity and to ensure fairness to the parties); *Birch v. Pioneer Credit Recovery, Inc.*, No, 06-CV-6497T, 2007 U.S. Dist. LEXIS 41834, 2007 WL 1703914, *5-6 (W.D.N.Y. June 8, 2007) (noting that "absent exceptional circumstances," the Second Circuit instructs courts to "abstain from exercising pendent jurisdiction" over state claims where federal claims have been dismissed on summary judgment) (quoting *Walker v. Time Life Films. Inc.*, 784 F.2d 44, 53 (2d Cir. 1986)). The issues posed by this malicious interference claim have no relation to federal law, and at this stage in the litigation, there would be "no extraordinary inconvenience or inequity occasioned by permitting the claims to be refiled in state court where they will be afforded a 'surer-footed reading of applicable law.'" *Kolari*, 455 F.3d at 123 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)).

CONCLUSION

For the foregoing reasons, the Court grants defendants' motion for summary judgment and dismisses plaintiff's federal equal protection claim with prejudice. The Court further dismisses plaintiff's state law malicious interference claim without prejudice.

SO ORDERED.

/s/ Brian M. Cogan
U.S.D.J.

Dated: Brooklyn, New York

September 11, 2008

Footnotes

1 Plaintiff withdrew its action as to defendants Richard F. Daines, M.D. and Wendy E. Saunders pursuant to Stipulation of the parties, So Ordered by the Court on June 16, 2008.

2 In a JURC 14, 2006 email, defendant Dr. Jenny had directed defendant Astin to review ADL's personnel roster "for new hires and prevalence of Pakistani imports."

3 On August 22, 2006, Kusel sent an email to Dr. Jenny and another DOH employee stating that Dr. Balakrishnan had two options with respect to the threatened charges: "admit to not fulfilling his duties as a director because he is incompetent or unwilling to comply ... OR he can fall on our mercies that the owners of ADL did not allow him to fulfill his duties -- at which point we may be able to show some leniency." On December 4, 2006, Kusel sent an email to Shulman stating she would be willing to "settle the old charges ... and issue a CQ that would be very close to expiring ... it would be more of a nice surprise when he's included in the ADL charges."

Filed: Dec. 16, 2010
Docket No. 08-6297-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANALYTICAL DIAGNOSTIC LABS, INC., Plaintiff-Appellant,

v.

BETTY KUSEL, RICHARD F. DAINES, M.D., WENDY E. SAUNDERS, RICHARD W. JENNY, Ph.D., STEPHANIE H. SHULMAN, M.S., DEIRDRE ASTIN, Defendants-Appellees.

Appellant Analytical Diagnostic Labs, Inc., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Cathrine O'Hagan Wolfe, Clerk